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SUBJECT: NEW CRIMINAL CODE IN THE BALANCE

REF: MANAGUA 02426 (2006), MANAGUA 01629 (2006), MANAGUA 01530

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¶1. BEGIN SUMMARY: In January 2007, the new leader of the National Assembly's Justice Commission requested USG help to garner approval of a draft Criminal Code, created with USAID support, which had languished since 2001. The Embassy strongly supports passage as it is critical to Nicaragua's investment climate, implementation of DR-CAFTA, and its anti-trafficking in persons (TIP) efforts. In an uncertain, new political environment, the Code would provide improved legal infrastructure to protect trade, investment, property and commerce for investors, both national and international. The Mission considers the time is now to push for passage, especially given the changed political context. If passed as drafted, the Criminal Code would give Nicaragua one of the best substantive criminal law structures in the region. END SUMMARY.

¶2. BACKGROUND: Starting in 1998, through USAID, the Embassy facilitated a process to enlist all relevant Nicaraguan stakeholders, including police, prosecutors, academics, and civil society representatives to draft a new Criminal Code for Nicaragua. Since 2001, that document has been under review by the National Assembly. The draft Criminal Code was unanimously approved in the Justice Commission of the National Assembly in 2003, and referred to the plenary for a final article-by-article discussion and vote. In 2004, the Assembly passed Articles 1 to 137. In 2005, because of the "pact," the work in the Assembly was blocked. On Feb. 23, 2006, the Assembly unanimously passed Articles 138 to 142, and from 150 to 162 (which correspond to homicides and assaults).

¶3. RECENT SUPPORT FOR THE DRAFT CODE: In January 2006, the government set up a final consultation process and asked for help. Based on guidance from the Ambassador, USAID proposed a revalidation process with the National Assembly, as it had been two years since the Code had been vetted by all justice sector actors, church groups, NGO community, law schools, etc. Nicaraguan President Enrique Bolaos made passage of the Code a priority for 2006, highlighting the legislation in his State of the Republic presentation. With the Code's obvious linkages to trade and investment, in an August 11, 2006 team meeting, the Ambassador made support for the Code, and its passage this legislative session, a U.S. Mission priority.

3.1. VALIDATION OF THE DRAFT CODE: Prior to 2005, there were extensive, exhaustive consultations on the draft Code with all relevant ministries, civil society, parties and religious organizations. In the interim, international commitments such as the Inter-American Convention Against Corruption and a range of international anti-money laundering standards (such as the "40

Recommendations" and "25 money-laundering criteria" from the G-7 Financial Action Task Force - FATF), as well as U.S. legislation on trafficking in persons, came into force. In this light, USAID assisted the Justice Commission to validate the Code. The Commission drafted more than 40 motions to improve and update the Criminal Code. Twenty-five of the motions have been approved by the National Assembly, covering critical issues such as money laundering, anti-corruption, sex crimes and trafficking in persons. The 2006 participatory consultation process included representatives of the Public Ministry, the Attorney General's Office, the National Police and the Banking Superintendent and robust lobbying by civil society groups helped ensure adequate sentences for these crimes.

3.2 ABORTION DEBATE DERAILED PASSAGE IN 2006: Despite unanimous bipartisan support in the National Assembly's Justice Commission, a single provision became a hot potato during the national election period. The proposed Code did not touch the abortion issue, leaving prior law in place. Prior law criminalized all abortion, except where the life of the mother was at risk. Anti-abortion activists, supported in particular by the Catholic Church, wanted Nicaraguan law to take a strong stand against all abortion, a stand which then candidate Daniel Ortega adopted. This debate held up the entire Code. In the end, the Code languished, while an amendment to existing law passed the Assembly to criminalize all abortion. Tragically, the debate about abortion and the politicized process on both sides of the issue meant that crimes such as human trafficking and money laundering did not get addressed. In the meantime, since the elections, according to local press reports, investor confidence has been shaken. It is time to get this legislation back on the political agenda.

14. KEY PROVISIONS: The Code would criminalize theft of intellectual property. It would improve prosecutors' ability to deal with alien smuggling, trafficking in persons and sex crimes. The Code overhauls and upgrades environmental crime law. It clearly sets forth conditions for fraud, misuse of funds and other elements of the criminal justice system prerequisite to a functioning market economy. It fills the void on illicit campaign contributions. Perhaps most importantly, the draft unambiguously proscribes money laundering as an autonomous, separate crime, regardless of whether the source of the funds laundered arise from narcotics or other crimes. (Loyalists to former president Arnoldo Aleman, serving a 20-year sentence for embezzlement and money laundering, tried unsuccessfully to negotiate a draft whereby money laundering was limited only to narcotics - that position continues to be Aleman's defense to the charges to date).

15. NEXT STEPS: Remaining concerns include extradition to and from Nicaragua (since this proposed Code, consistent with the Constitution and the Criminal Procedure Code, forbids extradition of nationals); punishment for conspiracy to engage in terrorism-related offenses; and tolling the statute of limitations in certain cases involving public figures who hide behind their official immunity. These additional issues will be addressed over the coming year, assuming the Code is passed, as complementary measures.

16. THE STAKES: CAFTA-DR is a major step toward improving the investment climate. However, trade law requires adequate commercial law, which in turn needs a solid civil law base. Civil law relies very fundamentally on a criminal code responsive to modern needs. The current Nicaraguan Code has been largely unchanged for a hundred years. Missing this opportunity could mean a setback for addressing the investment climate, an opportunity that may not return for another decade, as happened in Honduras. There have been years of investment in this Code by the Embassy country team.

The Mission considers the time is now to push for passage, especially given the changed political context. If passed as drafted, the Criminal Code would give Nicaragua one of the best substantive criminal law structures in the region.

17. CONCLUSIONS: Various justice institutions have adopted the draft Code and identify themselves with the product. In doing so, the institutions have shown responsibility and a capacity to incorporate practical solutions to technical proposals. At their request, USAID provided technical assistance to the authorities entrusted with the approval of the proposed Criminal Code. Incredibly, despite deep political divisions in Nicaragua, the draft Code enjoys near

unanimous, multipartisan support in the Assembly. The earlier drafting and validation processes have involved criminal justice system actors, providing from the start an environment for the correct implementation of the new legislation, if and when passed. The Code would be an outstanding complement to CAFTA-DR, and could help Nicaragua maintain its tier 2 status in the annual trafficking in persons report.

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